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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 378.

UNITED STATES OF AMERICA,
Appellant,

vs.

JAMES CLARENCE EVANS, Commissioner, Etc.,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

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Appellee adopts the statement as contained in the brief for the United States as to "Opinions Below", "Jurisdiction", "Questions Presented", and "Statutes Involved" (Brief for United States, pp. 1-3).

STATEMENT

Appellee adopts the "Statement" as contained in the brief for the United States (Brief of the United States, pp. 3-9), excepting that appellee would show to the Court that there was a direct conflict in the evidence on the question of whether Esso Standard Oil Company was led to believe that there was no tax due.

Mr. Cletus Green, formerly an employee of the Tennessee Department of Finance and Taxation, testified that the Director of the Gasoline Tax and Oil Inspection Division advised Esso to keep a record on the government owned gasoline because somebody might have to pay a tax on the same some day (Rec. 278, 293).

Mr. R. L. Weakley, for many years the Director of the Gasoline Tax and Oil Inspection Division of the State of Tennessee, testified that he could never obtain a ruling as to whether Esso's activities in storing the gasoline was taxable or not taxable but that he advised Esso on at least two occasions during the period that they would probably have to pay the tax (Rec. 211, 217).

SUMMARY OF ARGUMENT.

The seven cent tax here involved is a privilege tax assessed against any person or corporation storing gasoline in the State of Tennessee. It has been repeatedly so construed by the Supreme Court of the State of Tennessee and has been likewise construed by this Honorable Court. Having exercised that privilege it was incumbent upon Esso to pay the State Tax, and the mere fact that the gasoline which it stored as an independent contractor belonged to the United States or the fact that the United States had agreed to reimburse Esso any taxes which it might have to pay did not give immunity to Esso so as to free it from the privilege tax.

The fact that the Supreme Court of the State of Tennessee under facts which it considered extremely distinguishable held the taxing act not applicable does not constitute any discrimination against Esso or the United States.

THE ARGUMENT.

While this court has held that where a state adopts a strained construction of its taxing act so as to impose a direct tax on the property of the United States, this court will not be bound by any such construction, this court has repeatedly given great weight to the actual effect of the state taxing act as defined by the Supreme Court of the State whose act is involved.

In support of its argument that this Honorable Court should strike down the construction given the Tennessee taxing act by the Supreme Court of Tennessee and which construction has been previously recognized by this Honorable Court,* the appellant United States cites such cases as **New Jersey Realty Title Ins. Co. v. Division of Tax Appeals**, 338 U. S. 665, and **United States v. Allegheny County**, 322 U. S. 174. In these cases this Court has found that there was a direct ad valorem levy on properties belonging to the United States. In the **New Jersey Realty Title Ins. Co. v. Division of Tax Appeals**, 338 U. S. 665, case, this Court recognized the distinction between these cases and the case at bar and stated that: "The Section here in question was not considered as imposing a tax on privilege or franchise by either the New Jersey Legislature or the taxing officials or by any of the courts below" (338 U. S. at 674).

In the case of **United States v. County of Allegheny**, 322 U. S., at 174, while striking down the tax as being an ad valorem tax on property of the United States, this Honorable Court expressly pretermitted the question of whether the bailee could have been taxed on its right of possession for the use of the property in this language: "Whether such a right of possession and use (by Mesta) in view of all

* N. C. & St. L. Railway v. Wallace, 288 U. S. 249, at 265.

the circumstances could be taxed by appropriate proceedings we do not decide." 322 U. S., at 186.

As argument in support of its insistences that the tax was a levy on the consumer or on the gasoline, the United States attempts to deduce such conclusion from the Tennessee Public Act of 1947, which was passed subsequent to the date of the exercise of the privileges herein involved, declaring the tax to be a levy on the consumer. Contrary to the insistence of the United States, the well established rule of construction in Tennessee, with which the Legislature is presumed to be familiar, is to the contrary; the correct rule being that unless the act constituted a change in existing law it would not have been passed. Such rule was recently recognized by the Tennessee Supreme Court in the case of **State ex rel. Barksdale v. Wilson et al.** (June, 1952), 250 S. W. 2d 49, at 51 (not yet reported in the official Tennessee reporter).

It is true as insisted by the United States that the privilege of storage is taxed only once and that for the storage of certain classes of gasoline there is no taxing, but the fact that reasonable classifications are made, the reasonableness of which stand unchallenged in Tennessee judicial history, does not alter or change the character, nature or incidence of the tax. It stands undisputed in this record that Esso is a distributor of gasoline products.

The statutes involved are sections 1126 et seq. of the Code of Tennessee. In section 1126 a distributor is defined as follows:

> "The term 'distributor' means and includes every person who engages in the business in the state of refining, manufacturing, producing, or compounding gasoline or distillate, and selling or storing the same in this state; and also every person who engages in the business in this state of transporting, importing, or

causing to be imported gasoline or distillate into this state, and distributing, storing, or making original sales of the same in this state, for any purpose whatsoever."

Section 1127 of the Code of Tennessee provides, in part, as follows:

"Every distributor when engaged in such business in this state shall pay to the state comptroller, through commissioner of finance and taxation, for the exclusive use of the state, a special privilege tax, in addition to all other taxes, for engaging in and carrying on such business in this state, in an amount equal to six cents for each gallon of gasoline, and six cents for each gallon of distillate refined, manufactured, produced, or compounded by such distributor and sold, stored or distributed by him in this state, or shipped, transported or imported by such distributor into, and distributed, stored or sold by him within this state, during such year . . ."

Section 1126 et seq. of the Code of Tennessee was amended in 1931 and 1933 so as to increase the tax to seven cents per each gallon of gasoline stored.

This taxing act has been often considered by the Supreme Court of the State of Tennessee and by this Honorable Court. The old act levying the privilege tax on gasoline which applied to the storage thereof was first construed by the Supreme Court of Tennessee in the case of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412. In that case the court construed the Act to apply to those engaged in **storing** gasoline and then withdrawing it for sale or **other use**, the language of the Court being:

"We think the Act, when properly interpreted, not only applies to distributors and dealers in gasoline, but

applies to consumers who purchase gasoline in interstate commerce and store it, and thereafter distribute the same, or allow the same to be withdrawn from storage, **whether such withdrawal be for sale or other use.**" (Emphasis supplied.) 154 Tenn. (1 Smith) 412, at 420.

In that case the Supreme Court defined direct or property taxes and indirect or privilege taxes, noting that the latter are sometimes called excise or occupation taxes and held that the Tennessee act was not a property or ad valorem tax, but was a privilege tax levied against the distributor for the privilege of engaging in the occupation of storing gasoline.

In the subsequent case of **Quick Service Tire Co. v. Smith,** 156 Tenn. (3 Smith) 96, the Supreme Court of Tennessee said, in dealing with the privilege or occupation tax on distributors which was then in effect under the Public Acts of 1923 and 1925 as follows:

"By Chapter 58, Acts of 1923, Chapter 4, Acts of 1925, a special privilege tax of three cents a gallon in addition to all other taxes was imposed upon those engaged in the business of distributing or selling gasoline (6).

"By Chapter 67, Acts of 1925, the tax of three cents a gallon was made to apply not only to gasoline sold and distributed to consumers, but **also 'to persons, firms or corporations, dealers or distributors, storing . . . and distributing the same,'** and under this Act it was held in **Foster & Creighton Co. v. Graham,** supra, that one storing gasoline for personal use could not avoid payment of the tax of three cents a gallon on gasoline." (Emphasis supplied.) 156 Tenn. (3 Smith) at 101.

In the case of **N. C. & St. L. Railway v. Roy C. Wallace, Comptroller, etc.,** 288 U. S. 249, the Court had before it

certain questions raised by the N. C. & St. L. Railroad with respect to the same taxing act involved in the instant case. There the railroad purchased large quantities of gasoline outside of the State of Tennessee and brought it into the state in tank cars from which it was unloaded and placed in the railroad's own storage tanks and from which it was withdrawn and used by the railroad as a source of motive power in interstate railway operation in several states. This Court held that the gasoline upon being unloaded and stored ceased to be the subject of transportation in interstate commerce and lost its immunity as such from State taxation. In considering the nature, operation and effect of the very tax under consideration this Court found the tax to be a true privilege tax and upheld the assessment of the privilege tax by the State of Tennessee. In support of its conclusion this Court cited the Tennessee cases of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, and **Quick Service Tire Co. v. Smith**, 156 Tenn. (3 Smith) 96.

Again in the cases of **The Texas Co. v. Fort et al.**, and **Pan American Petroleum Corp. v. Fort et al.**, 168 Tenn. (4 Beeler) 679, the Supreme Court of Tennessee had occasion to consider the taxing act here involved. In these cases Chapter 130 of the Public Acts of Tennessee of 1933, which amended the 1923 Act, as amended by the 1925 Act, was challenged. This 1933 amendment provided that the tax should be paid by dealers and distributors measured by the amount held in storage instead of measured by the amount withdrawn from storage. The particular question was whether gasoline brought into the State before the amendment and being stored at the time of the amendment could be used as the measure of the tax as well as gasoline brought into the State after the amendment. The Supreme Court of Tennessee held that the Act as amended was a "privilege tax on engaging in the business of storing gasoline," and since it was the business of storing that was

taxed, the Act applied alike to both classes of storage (168 Tenn. [4 Beeler], at 687).

In referring to its decision in the **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, case, the Supreme Court said:

> "This case settled the proposition that the tax levied by Chapter 130 is not a property tax on the gasoline placed in storage before the effective date of the Amendatory Act, **but that it is a privilege tax on the engaging in the business of storing gasoline based on the number of gallons in storage.**" (Emphasis supplied.)

In the case of **American Airways v. Wallace** (Tenn. D. C. 1932), 57 F. (2d) 877, certiorari denied by this Court in a per curiam opinion, the American Airways sought to enjoin the Commissioner of Finance and Taxation of the State of Tennessee and the Comptroller of the State from collecting the tax measured by gasoline which it purchased in tank cars outside of the State and brought by railroad into Tennessee to be stored in American Airways' private tanks until such time as it was needed, when it was withdrawn, placed into the airplanes of American Airways and used as a motor fuel; this on the basis that it was an imposition of a burden upon interstate commerce. This case was heard before a three-judge District Court consisting of Moorman, Circuit Judge, and Gore and Dawson, District Judges. In construing the Tennessee case of **Foster & Creighton v. Graham**, 154 Tenn. (1 Smith) 412, the District Court said:

> "**The statute in question does not impose a property tax upon the gasoline, but it imposes an 'excise' or 'privilege' tax upon the business of storing and withdrawing the gasoline and the amount is computed on withdrawals.**"
>
> 57 F. (2d), at 880.

The District Court further held that the storage and withdrawal being completed in Tennessee was an intrastate transaction.

Thus it becomes apparent that on every occasion regardless of what parties were involved or what Court was considering the Act, whether the State Court, the Federal District Court or this court, it has been uniformly held that the taxing act is a pure privilege tax. Appellee respectfully submits that such a characterization of the tax is the only logical one that can be given it.

The United States further attacks the Act on the theory that the amount charged for storage was not as much as the tax assessed for the privilege. What is obviously overlooked in any such argument is that the Act applies to the exercise of the privilege even though no charge is made for the storage. Such was the case in **N. C. & St. L. R. R. v. Roy C. Wallace, Comptroller, etc.**, 288 U. S. 249, and such likewise was the case in **American Airways v. Wallace** (Tenn. D. C. 1932), 57 F. (2d) 877, certiorari denied by this court. This argument likewise overlooks the fact that the exercise of the privilege of storage by Esso during this period permitted it to keep its organization and its employees which would have been difficult otherwise since, as appears from this record, practically all gasoline of the character stored belonged to the United States.

We respectfully submit, therefore, that the taxing act is in every respect a privilege tax for which Esso was liable.

If, as insisted by the appellant, United States, the tax in question is an ad valorem or property tax then its insistence would be well founded and the State of Tennessee would not be entitled to collect the tax. If, on the contrary, the tax in question is as found by the Supreme Court of the State of Tennessee, by the United States

District Court and by this Honorable Court, a privilege or occupation tax, the appellant's insistence is without merit and the mere fact that the economic burden of the tax may ultimately fall on the United States does not give any implied immunity to Esso, the taxpayer.

Under the rules of law which formerly prevailed, probably Esso would have been immune from the taxes here sought to be imposed. This is clearly shown by the case of **Panhandle Oil Co. v. Mississippi**, 277 U. S. 218. There the question involved was whether or not the State of Mississippi could impose a privilege tax on gasoline distributors measured by their gallonage, which gallonage included sales to the United States for the use of the Coast Guard Fleet and the Veterans Hospital. This Court, speaking through Mr. Justice Butler, held that it was immaterial that the seller and not the purchaser was required to report and make payment to the state, and that since the tax depended upon the number of gallons, the effect of the tax was to retard and burden the exertion by the United States of its constitutional powers. Therefore, the tax was invalid. This was upon the theory of the old **M'Culloch v. Maryland**, 4 Wheat. 316. Mr. Justices Holmes, Brandeis, Stone and McReynolds all dissented. In the later case of **Graves v. The Texas Co.**, 298 U. S. 393, this Court had before it an Alabama Excise or Privilege Tax levied upon storers of gasoline which accrued at the time of the withdrawal from storage. Some of this gasoline was withdrawn and sold to the United States for the use and performance of governmental functions. Again this Court, speaking through Mr. Justice Butler, held that the state tax on storing measured by the gallons withdrawn for sale or other use when measured by gasoline withdrawn and sold to the United States infringed the constitutional principle safeguarding the Federal Government from state taxation. Mr. Justices Cardozo and Brandeis dissented.

The first whittling at the rule of the **Graves** and **Panhandle** cases came in the case of **James v. Dravo Contracting Co.**, 302 U. S. 134. In that case the Dravo Contracting Co. had a contract with the United States to build locks and dams in certain navigable rivers located in West Virginia. West Virginia levied an occupation tax against contractors measured by gross income and sought to include in gross income the amount paid to Dravo by the United States. This Court, through Mr. Chief Justice Hughes, held that such was not a direct tax or direct burden on the Federal Government even though the imposition of the tax might increase the cost to the Government, and that, therefore, the tax was valid. With respect to the **Panhandle** case and the **Graves** case the Court held that:

> "These cases have been distinguished and must be deemed to be limited to their particular facts" (302 U. S. 151).

Finally, in 1941, in the case of **State of Alabama v. King & Boozer**, 314 U. S. 1, this Court, speaking through Mr. Chief Justice Stone, overruled the Panhandle case and the Graves case. In the King & Boozer case the State of Alabama had a sales tax under which the seller was chargeable, but was required to collect from the buyer a tax for goods sold. King & Boozer had a contract with the United States to build an Army camp. This contract was a cost plus a fixed fee contract. The State of Alabama under its state sales tax sought to require King & Boozer to pay the state sales tax on all materials which they purchased for use in the construction of the camp. This Court, speaking through Mr. Chief Justice Stone, said:

> "Congress has declined to pass legislation immunizing from state taxation contractors under 'cost plus' contracts for the construction of governmental projects. Consequently, the participants in the present transaction enjoy only such tax immunity as is afforded by the Constitution itself, ..." (314 U. S. 8).

The Court further said:

> "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, this is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right to the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., supra, we think it no longer tenable" (314 U. S. 8).

On the same date this Court determined the case of **John C. Curry v. United States of America,** 314 U. S. 14. In that case the Court had before it an Alabama Use Tax. The tax provided "An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased at retail . . . for storage, use or other consumption in this state at the rate of 2 per cent of the sales price of such property."

Again, it was the situation of contractors building an Army camp for the United States on a cost-plus contract basis. They had purchased roll roofing outside the state and brought into the state where they used the same in the performance of their construction contract with the Government. Speaking through Mr. Chief Justice Stone, this Court said:

> "For the reasons stated at length in the King & Boozer case we think that the contractors, in purchasing and bringing the building material into the state and in appropriating it to their contract with the government, were not agents or instrumentalities of the government; and they are not relieved of the tax,

to which they would otherwise be subject, by reason of the fact that they are government contractors" (314 U. S. 17).

Going further, the Court said:

"If the State law lays the tax upon them (the contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the government, like the individual, only as the economic burden is shifted to it through operation of the contract. As pointed out in the opinion in the King & Boozer case, by concession of the Government and on authority, the constitution, without implementation by Congressional legislation, does not prohibit a tax upon Government contractors because its burden is passed on economically by the terms of the contract or otherwise as a part of the construction cost to the Government" (314 U. S. 18).

Thereafter, there seemed to have been some confusion as to whether or not this Court intended to overrule the Panhandle case and the Graves case. This Court attempted to lay this question to rest in the case of **Penn. Dairies v. Milk Control Commission**, 318 U. S. 261, when the Court said with respect to certain opinions of the Comptroller General:

"All rest on the reasoning of the Panhandle Oil Co. v. Knox, 277 U. S. 218, and like cases, which were overruled in Alabama v. King & Boozer, supra" (318 U. S. 277).

Subsequent to the Dravo case, but prior to the decision in the King & Boozer case, the Supreme Court of North Dakota held in the case of **Federal Land Bank v. De Rochford**, 69 N. D. 382, 287 N. W. 522, that a tax on the sale of motor vehicle fuel to a Federal Land Bank was valid.

The Mississippi Supreme Court, in 1940, immediately prior to the King & Boozer case, held in the case of **Com-**

press of Union v. Stone, 188 Miss. 49, 193 Sou. 329, that a gross income tax applied to receipts from the compressing of cotton for the Commodity Credit Corporation, which was a wholly owned Federal instrumentality, was a valid tax.

In 1943 the Supreme Court of Florida, in the case of **United States v. Lee**, 153 Fla. 94, 13 Sou. (2d) 19, held that a privilege tax levied on the vendor of gasoline, which privilege tax applied to the vendor even though the sale of gasoline was to the United States, was a valid tax.

Where the Federal Congress has by specific enactment immunized from state taxation activities in furtherance of one of its instrumentalities, then such immunization is good. Such was the holding of this Court in an opinion by Mr. Justice Murphy in the case of **Federal Land Bank v. Bismark Lumber Co.**, 314 U. S. 95. The Court, however, in this case did not discuss what would have been the effect of such a tax if Congress had not so immunized the transaction and laid its decision squarely on the fact that such immunization had been granted by specific Congressional enactment.

In the case at bar there is no claim made of any congressional immunization, the reliance being solely upon implied immunity.

In the case of **Penn. Dairies v. Milk Control Commission**, 318 U. S. 261, this Court was faced with the question of whether or not the minimum price regulations of the State of Pennsylvania could constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state and in a place subject to its jurisdiction. The Court held, speaking through Mr. Chief Justice Stone, that the Congress could have immunized the government from such state regulation by declaring the same inapplicable to sales

to the government, but that in the absence of such immunization by specific enactment, nondiscriminatory taxation or regulation of a contractor with the government was not invalid even though it imposed an increased economic burden on the government, this on the authority of the King & Boozer and other cases. Going further, the Court had this to say:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself, and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on the citizens of the United States within the states' borders. See Metcalf and Eddy v. Mitchell, supra (296 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, . . ." (318 U. S. 270).

Mr. Justice Douglas wrote a dissenting opinion in which Messrs. Justice Black and Jackson joined, but the dissent in this case was based on the proposition that Congress had indirectly required competitive bidding with respect to the purchase of all supplies and that this, in and of itself, was sufficient immunization by Congress from any minimum price regulation.

In the case of **Mayo v. United States**, 319 U. S. 441, this Court was confronted with this situation. The State of Florida had a commercial fertilizer inspection law by the terms of which every bag of fertilizer had to be inspected and an inspection fee paid before the same could be distributed. The United States Government, under its soil conservation program, purchased fertilizer outside of the State of Florida and put the same into the State of Florida there to be distributed by it as a part of the program. The State of Florida sought to stop the distribution by the United States of the fertilizer which belonged to the United States on the ground that the same was not inspected. This Court, speaking through Mr. Justice Reed, held that this could not be done because this was **a direct inspection fee charged to the United States Government** for inspecting property belonging to the United States Government. The Court's language was as follows:

> "These inspection fees are laid directly upon the United States. They are money exaction the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the Supremacy Clause. We are not dealing as in Graves v. New York, supra, with a tax upon the salary of an employee, or as in Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, with a tax upon the purchases of a supplier, or as in Penn. Dairies v. Milk Control Commission, No. 399, October Term, 1942, decided March 1, 1943 (318 U. S. 261, ante, 78, 63 S. Ct. 617), with price control exercised over a contractor with the United States. In these cases the exaction directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the Post Office or upon the privilege of selling United States bonds through Federal officials" (319 U. S. 447).

The distinction between the case of **Mayo v. United States** and the case at bar is clear. If Tennessee sought to tax the gasoline which was stored, the tax would be invalid. In like manner, if the United States was storing the gasoline in its own tanks, the tax would be invalid; but in this case the tax is on appellant for the privilege of storing the gasoline.

The Supreme Court of the State of Tennessee recognized this distinction when it refused to permit the exaction of an inspection fee because the same was a direct tax upon the commodity, as contrasted with the privilege tax on appellant for exercising the privilege of storing gasoline.

The distinction is borne out by the Supreme Court of the United States in the case of **United States v. Allegheny County**, 322 U. S. 174. In the **County of Allegheny** case Mesta Machine Company, located just out of Pittsburgh in Allegheny County, had a contract with the United States Government to manufacture big guns for ordnance. The United States Government owned certain of the machinery used in the manufacture. Allegheny County sought, under its property tax, **an ad valorem tax**, to tax to Mesta Machine the value of the machines owned by the United States. Speaking through Mr. Justice Jackson, this Court held, first, that the title to the property in question was in the United States and is effective for tax purposes. After making this holding, it found that the assessment against Mesta for the ad valorem property tax was increased, based upon the value of the machinery owned by the United States. The Court held that the ad valorem tax was not a form of personal taxation **"but rather as a tax against the property as a thing."** This Court's complete description of the transaction and its holding is contained in the following language:

> "The assessors made no claim that the temporary presence of the Government's machinery actually en-

hanced the market value or the use value of Mesta's land. The assessors simply and forthrightly valued Mesta's land as land, and the Government's machines as machinery, and added the latter to the former. We discern little theoretical difference, and no practical difference at all, between what was done and what would be done if the machinery were taxed in form. Its full value was ascertained and added to the base to which the annual rates would apply for county, city, borough, town, township, school and poor purposes.

"We hold that the substance of this proceeding is to lay an ad valorem general property tax on property owned by the United States" (322 U. S. 185).

In the case of **Smith v. Davis**, 323 U. S. 111, contractors with the United States Government sought to exclude from their assessment for ad valorem purposes the amount of an open account claim against the United States Government. This Court held that, of course, this was improper and that the ad valorem tax applied. The Court said:

"That this asset involves a claim against the Federal Government is no more fatal to the validity of the tax than the fact that in James v. Dravo Contracting Co. (Citation) the tax was levied on the contractor's gross receipts from the United States or the fact that in Alabama v. King & Boozer (Citation) the sale tax was placed on the sale of property to a contractor for use in a Federal project. **The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned.**" (Emphasis ours.) (323 U. S. 116.)

The clearest case on the point involved here is the case of **Wilson v. Cook**, 327 U. S. 474, where this Court was confronted with the question of whether or not a privilege

tax upon each person engaged in the business of severing from the soil for commercial purposes natural resources, including timber, was applicable to contractors severing timber belonging to the United States from land belonging to the United States within the State of Arkansas where title to the timber remains in the United States until the same had been paid for after being severed.

The statute had a further provision in it to the effect that the severer was required to collect the tax from the owner of the timber at the time of severance and gave the state a lien on the land from which the lumber was severed. With respect to the tax itself, this Court held:

> "Our decision in James v. Dravo Contracting Co. (Citation) and in Alabama v. King & Boozer (Citation) and the cases cited in these opinions, can leave no doubt that the Supreme Court of Arkansas correctly held that plaintiffs, **who are taxed by the state on their activities in severing lumber from government lands** under contract with the government, cannot claim the benefit of the implied constitutional immunity of the Federal Government from taxation by the state." (Emphasis ours.) (327 U. S. 482.)

With respect to the additional questions concerning the lien, the Court held that this had not been correctly raised in the State Court and was not properly before it, and that, therefore, it could not make any determination respecting this question.

In the recent case of **Oklahoma Tax Commission v. Texas Co.** and **Oklahoma Tax Commission v. Magnolia Petroleum Co.**, 336 U. S. 342, this Court had before it an Oklahoma Statute imposing two taxes upon the production of petroleum within the State, one a tax on the gross value of production in lieu of all other local ad valorem property taxes

and another an excise tax on every barrel of petroleum produced. The Oklahoma Tax Commission assessed both taxes against lessees of mineral rights in allotted and restricted Indiana lands. The State Supreme Court of Oklahoma, feeling itself bound by former decisions of this Court, held the assessments to be invalid on the ground that the lessee was an instrumentality of the Federal Government. In an opinion by Mr. Justice Rutledge this Court reviewed the change in theory on the doctrine of governmental immunity, quoting the provision from the **King & Boozer** case as follows:

> ". . . The Constitution, unaided by Congressional legislation . . . (does not prohibit) a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory State tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity" (336 U. S. 359).

Mr. Justice Rutledge, in speaking of a previous decision on which the Texas Company relied, said:

> "Since that decision, as we have noted, the process has been reversed in direction. True inter-governmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypotheti-

cal interferences with governmental functions here asserted to sustain exemption." (336 U. S. 365.)

A recent District Court case on the subject is the case of **Broadhead v. Borthwick**, 174 F. (2d) 21, certiorari to the Supreme Court of the United States denied October 17, 1949, 338 U. S. 847. In that case, under the Hawaii General Excise Tax Act, an excise tax was imposed on every person engaged in the business of selling any tangible personal property. These excise taxes were imposed upon Broadhead on sales made by Broadhead to Army Post Exchanges and Naval Ship Stores. The Federal District Court, in sustaining the Supreme Court of Hawaii's decision upholding the General Excise Tax as involved here, held:

> "It is clear that before 1942 or before any of the instant taxes accrued, as well as also later, the United States Supreme Court had in a series of decisions overruled the ban previously promulgated by the Panhandle case. See James v. Dravo Contracting Co. (Citation), State of Alabama v. King & Boozer (Citation), Curry v. United States (Citation), Penn. Dairies v. Milk Control Commission (Citation); in which last opinion in 1943 the Supreme Court definitely states that the Panhandle doctrine was overruled by State of Alabama v. King & Boozer, 1941, supra." (174 F. [2d] 22.)

II.

The Tax in Question as Construed by the Supreme Court of the State of Tennessee and as Levied and Collected in the Instant Case Does Not Constitute an Unconstitutional Discrimination.

As respects this second question raised by the United States in its brief (Brief for United States, pp. 44-53), we submit that the answer is three fold.

A. In the first place this question was first raised on a petition to rehear in the State Court, at which time under the rules of the State Court, it was not subject to consideration by that court. **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, at 704.

It is fundamental that this court will not consider a constitutional question on appeal from a state court where that question was not considered and ruled on by that court. **Tennessee Oil Co. v. Commissioner**, 317 U. S. 588; **Godchaux v. Estopinal**, 251 U. S. 179; **McCorquodale v. Texas**, 211 U. S. 432; **Cox v. Texas**, 202 U. S. 446.

Nor is the argument that the question was raised at the earliest opportunity available to appellant here. The same insistence now made with respect to the case of **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, could have been made upon the appeal to the Supreme Court of Tennessee because according to the theory of appellant that case was controlling and it was certainly not followed by the trial court. Therefore, such cases as appellant cites making exception to the rule where a litigant had no prior opportunity to assert the claimed Federal immunity are not applicable.

B. Apart from the rule of when the question had to be raised and relied upon, we respectfully submit that the argument that the decision in **Tennessee Oil Co. v. McCanless**, 178 Tenn. (14 Beeler) 683, brings about an unconstitutional discrimination against the taxpayer, is totally without merit.

The **Tennessee Oil Co. v. McCanless**, supra, case and the case at bar, as pointed out by the Supreme Court of the State of Tennessee, involved two completely different and distinguishable factual situations (R. 9). In the Tennessee Oil Company case the exempt agency, the Obion County Board of Education, was doing the storing itself through

its own agent or servant (178 Tenn., at 692). It had leased the tank in which the storing was done so that, as found by the court, the situation was the same as if it had owned the tank in which it stored the gasoline (178 Tenn., at 691). Since it is the storing which is taxed under all the authorities, the exempt agency was exercising the taxable privilege.

In the instant case Esso, as an independent contractor, stored the gasoline as a business for which occupation or privilege a privilege tax was levied against it. It was not an exempt agency and was not acting as the agent or servant of an exempt agency so that the exempt agency, the United States, was not exercising the taxable privilege but the non-exempt agency, Esso, was exercising it.

It is not discrimination under either the Supremacy clause or the Equal Protection clause of the Fourteenth Amendment where the entire circumstances are dissimilar or the classifications based upon reasonable distinctions. **New York Rapid Transit Corp. v. New York**, 303 U. S. 573, at 578 and 579; **Frost v. Corp. Commission**, 278 U. S. 515, at 522.

C. Finally, even if it could be said that the Supreme Court of Tennessee departed from its conclusions in the case of **Tennessee Oil Company v. McCanless**, 178 Tenn. (14 Beeler) 683, such inconsistency would not be a deprivation of the equal protection clause of the Fourteenth Amendment to the Constitution because, as this Court has repeatedly stated, a court is free to depart from precedents if, on further reflection, it thinks them wrong. **Milwaukee El. Ry. and Light Co. v. Wisconsin ex rel.**, 252 U. S. 100 at 105 and 106; **Fidelity and Columbia Trust Co. v. City of Louisville**, 245 U. S. 54, at 59.

CONCLUSION.

We respectfully submit that the judgment of the Supreme Court of the State of Tennessee affirming the judgment of the lower court should in all respects be affirmed by this court:

Respectfully submitted,

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